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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 UNITED STATES OF AMERICA, et al.,

10 Plaintiffs,

11 v.

12 STATE OF WASHINGTON, et al.,

13 Defendants.
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CASE NO. CV 9213

Subproceeding No. 01-02

ORDER ON MOTION TO COMPEL

15 This matter is before the Court for consideration of a motion to compel by the Samish Indian
16 Nation ("Samish"). Dkt. # 223. The Samish seek to compel the Swinomish Indian Tribal Community
17 ("Swinomish") and Lummi Nation ("Lummi") to produce certain documents generated during settlement
18 proceedings. The Swinomish and Lummi have opposed the motion. The relevant facts are known to the
19 parties and need not be reviewed here. For the reasons set forth below, the motion shall be granted.

20 DISCUSSION

21 In response to a Samish discovery request, the Lummi and Swinomish produced copies of a
22 settlement agreement between them, dated June 15, 1998. This settlement agreement, which among
23 other matters resolved issues between these two tribes regarding their rights as successors to the
24 aboriginal Samish, was not approved by the Court nor filed in *U.S. v. Washington*. After receiving a
25 copy of the settlement agreement, the Samish argued that they were entitled to discovery of the
26 documents relevant to the formation of this settlement agreement. The Lummi and Swinomish asserted
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1 that any documents that evidence communications leading to the formation of the settlement agreement
2 are “privileged” pursuant to Federal Rule of Evidence 408, and accordingly provided a privilege log of
3 the documents. Declaration of Craig Dorsey, Exhibit 6, 7. The Samish contend in this motion that the
4 documents themselves should be provided.

5 Rule 408 states that evidence related to a settlement agreement

6 is not admissible to prove liability for or invalidity of the claim or its amount. Evidence
7 of conduct or statements made in compromise negotiations is likewise not admissible.
8 This rule does not require the exclusion of any evidence otherwise discoverable merely
9 because it is presented in the course of compromise negotiations. This rule also does not
require exclusion when the evidence is offered for another purpose, such as proving bias
or prejudice of a witness, negating a contention of undue delay, or proving an effort to
obstruct a criminal investigation or prosecution.

10 Fed. R.Evid. 408. The Samish argue that they are entitled to these documents because their purpose does
11 not go to the liability of the settling parties, but rather to their motive in reaching the settlement, and their
12 conduct in the earlier proceedings in this litigation. The Samish contend that these matters are relevant to
13 the equitable considerations at issue in this subproceeding.

14 The Lummi and Swinomish, in response, contend that their conduct in reaching the settlement
15 agreement is not relevant to the equitable considerations at issue in these Rule 60(b) proceedings. They
16 contend that the issue in a Rule 60(b) motion is whether the moving party (here, the Samish) acted
17 equitably, not whether they did. They also argue that the real purpose of the Samish motion is to force
18 the Lummi and the Swinomish to relitigate the issue of succession from the treaty-time Samish, a matter
19 already decided by this Court. Finally, they contend that Samish is trying to “poison the well” by
20 implying there was a “nefarious scheme” by the other tribes to deprive the Samish their due.

21 The Court finds that the documents sought here fall under the Fed. R. Evid. 408 exceptions, in
22 that they may be relevant to the undue delay which is at issue here. The Court declines to adopt the
23 argument of the Lummi and Swinomish that only the conduct of the moving party may be considered in
24 this Rule 60(b) proceeding. Rule 60(b)(6) relief is an extraordinary remedy, which will not be granted
25 “unless the moving party is able to show both injury and that circumstances beyond its control prevented
26 timely action to protect its interests.” *U.S. v. Alpine Land & Reservoir, Co.*, 984 F. 2d 1047, 1049 (9th
27 Cir.); *cert. denied*, 510 U.S. 813 (1993). The conduct of other parties may be part of those

1 circumstances beyond the control of the Samish. As the documents here may be relevant to those
2 circumstances, the Samish are entitled to discovery. Their use will be limited, by Court Order if
3 necessary, to purposes which are permissible under Rule 408.

4 The Samish motion to compel is accordingly GRANTED. The disputed documents shall be
5 provided to the Samish within one week of the date of this Order.

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7 Dated this _15_ day of August, 2006.

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10 RICARDO S. MARTINEZ
11 UNITED STATES DISTRICT JUDGE
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